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No. 04-1244

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the petition, we showed that review is warranted both to bring the Seventh Circuit into compliance with the mandate in *Scheidler* v. *NOW, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"), and to resolve conflicts on two other significant issues presented. Respondents do not deny the national importance of the Hobbs Act and RICO injunction issues presented, or the existence of serious conflicts in the circuits on those issues. Instead, they maintain that the Seventh Circuit's decision is somehow consistent with *Scheidler II* – despite this Court's commands that "all" the predicate acts "must be reversed" and the injunction "must be vacated" – and that this 19-year-old case is not yet ready for resolution of the Hobbs Act question. Those arguments should fail. For the reasons stated in the petition and below (and in Operation Rescue's petition and reply brief in No. 04-1352), as well as those in three *amicus* briefs filed by a wide array of governmental, labor union, organizational, and individual *amici*, summary reversal or plenary review is warranted.

I. The Decision Below Is Contrary To This Court's Unambiguous Mandate In *Scheidler II*

This Court gave clear instructions in remanding:

> Because ***all of the predicate acts*** supporting the jury's finding of a RICO violation ***must be reversed, the judgment that petitioners violated RICO must also be reversed.*** Without an underlying RICO violation, the *injunction* issued by the District Court ***must necessarily be vacated.***

537 U.S. at 411 (emphasis added in part). The Court's description of its own holding confirms its stated intention to invalidate not some but "all" of the RICO predicates – including the four predicates the Seventh Circuit thought might have somehow survived: "We further hold that our determination with respect to extortion under the Hobbs Act *renders insufficient* ***the other bases or predicate acts of racketeering*** supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397 (emphasis added). Relying on its decision to invalidate *all* of

the underlying RICO predicates, the Court explained: "We therefore need not address the second question presented" concerning private RICO injunctions. *Id.* at 411.

Respondents do not even mention the crucial language of this Court's opinion until page 10 of their brief. When they finally do, they first claim that this Court's opinion contains "[n]ot one word" addressing the "4 predicate acts found by the jury premised on physical violence." Br. in Opp. ("Opp.") 10; see also *id.* at 17. But this Court's opinion says that "all" of the RICO predicates "must be reversed" – not "some," not "all the ones we have discussed," and certainly not "all but four." Although respondents suggest that "all of the predicate acts supporting the jury's finding of a RICO violation" really means "all of the *extortion-based* predicates" (Opp. 10 (emphasis added)), this Court's opinion contains no such qualifying language. And respondents do not, and cannot, deny that the four predicates they claim remain unaffected by *Scheidler II* were among those that "support[ed] the jury's conclusion that petitioners violated RICO." 537 U.S. at 397; *id.* at 411.

Respondents seek to change the terms of the debate. They emphasize an uncontested point – *Scheidler II* does not include a discussion of whether the Hobbs Act punishes acts or threats of violence that are unconnected to either robbery or extortion (an argument respondents unsuccessfully pressed at the petition stage of *Scheidler II* but abandoned at the merits stage). Opp. 15, 19. The critical issue, however, is not whether the Court's opinion analyzes this issue but *whether it disposes of these four claims.* As respondents emphasize, the Court's formal mandate required that the Seventh Circuit conduct any further proceedings "*in conformity* with the opinion of this Court." Opp. App. 1a (emphasis added). The Seventh Circuit's view that this Court *should have* discussed the four violence-only supposed predicates if it was going to reverse "all" the predicate acts is a criticism of this Court's opinion (suitable for a rehearing petition by a party), not conformity with this Court's opinion (suitable for a lower court following a mandate).

Had respondents filed a rehearing petition claiming that this Court had overlooked four of the predicate acts, they would have had to explain how their position could be reconciled with (1) the fact that the parties *repeatedly* and *prominently* referred to these four predicates at both the petition and merits stages;[1] (2) this Court's *rejection* of respondents' argument, at the petition stage, that review of the Hobbs Act issue should be denied because these four supposed predicates were *not* within the question presented and could serve as an independent basis for upholding the RICO judgment; (3) respondents' abandonment, at the merits stage, of any reliance on these four predicates; and (4) respondents' tactical decision to rely on an argument that *presupposed* that ***all of the Hobbs Act counts – including these four – were in fact related to extortion***. See Pet. 15-16. Not surprisingly, respondents elected not to seek rehearing but to take their chances with the panel that had previously ruled in their favor. That tactical choice should not be rewarded.

This Court's reasoned decision to avoid resolving the second question granted in *Scheidler II* – whether private injunctive relief is available under RICO – does not even receive the dignity of a mention on page 10 of the brief in opposition; rather, respondents (like the court below) simply ignore it. This Court's statement that it "need not" address the question of private injunctions under RICO rested on the premise that the

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[1] See Pet. 15 (citing some references in the briefs); see also 01-1118 Response Br. of Operation Rescue 4-5 & n.3; 01-1118 Cert. Reply Br. 1-2; 01-1119 Cert. Reply Br. 1; 01-1118 and 01-1119 Scheidler Op. Br. 7 n.7; 01-1118 and 01-1119 Operation Rescue Op. Br. 3, 4 n.8, 5 n.10, 7 n.7, 32 n.34; 01-1118 and 01-1119 Resp. Br. 7 n.7; 01-1118 and 01-1119 Scheidler Merits Reply Br. 2; 01-1118 and 01-1119 Operation Rescue Merits Reply Br. 1, 2, 14-15. Many of these references were quite prominent. Thus, at both the petition and merits stages of *Scheidler II*, respondents sought to portray petitioners as having engaged in numerous violent protests over several decades. In response, petitioners repeatedly pointed out that *only four* of the Hobbs Act predicates involved acts or threats of violence. The rest were nonviolent.

injunction in this case "must necessarily be vacated" – a premise the Seventh Circuit saw fit to deny. 537 U.S. at 411.

Echoing the panel's reasoning, respondents next insist that the Court could not have resolved these four supposed Hobbs Act predicates because they fell outside the questions presented in *Scheidler II*. That argument rests on a mistaken premise. As previously explained, these four predicates *were* indeed "fairly included" within the questions presented because (as both sets of petitioners argued at the petition stage in that case) there is no such thing as a "violence only" crime under the statute. Pet. 15. Thus, contrary to respondents' suggestion (at 7), there was no need to "amend" the questions presented. Moreover, as respondents do not deny, the defective definition of "property" contained in the jury's instructions – which included "anything of value, including a woman's right to seek services from a clinic" (Pet. App. 182a) – applied with equal force to the four relevant Hobbs Act predicates and was the subject of extensive debate at the merits stage of *Scheidler II*. See Pet. 15-16.

Furthermore, the conclusion of respondents' argument does not follow from its premise. As previously explained (Pet. 17), this Court may go beyond the questions presented – and sometimes does so when necessary *properly to dispose of a case that is before it*. See, *e.g.*, *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005); *Ballard* v. *Commissioner*, 125 S. Ct. 1270, 1275 n.2 (2005). Thus, in *Scheidler II* this Court saw fit to go beyond the questions granted to invalidate the *state* extortion counts underlying the RICO judgment (even though the Court had *denied review* of a separate question presenting that very issue). The panel therefore was simply wrong in refusing to "presume" that the Court "went beyond the scope of its grant of certiorari" (Pet. App. 5a) – the Court plainly *did so* with respect to the state counts. Contrary to respondents' suggestion, this is not an argument that this Court "disregard[s] * * * Rule 14.1(a)" (Opp. 16); as even the Seventh Circuit recognized, Rule 14.1 states only a "general rule" that is

subject to various recognized exceptions.[2] In any event, the Seventh Circuit had no more warrant to look behind the plain words of this Court's opinion – such as "all" and "must" – to analyze the Court's adherence to its own rules than a district court has to disregard an appellate mandate based on its analysis of what the court of appeals should have done in a particular case. That is not "conformity with the opinion of this Court."

Finally, respondents warn that if this Court enforces the clear meaning of its mandate in *Scheidler II*, it will create a "dramatic expansion" of "needless litigation in this Court" by "requir[ing] every respondent to raise in this Court every conceivable alternative ground" for affirmance and by "exponentially increas[ing] the need for motions for clarification." Opp. 17, 19, 20. The argument is worse than absurd. Our argument for summary reversal is based on the Seventh Circuit's failure to comply with particular language in this Court's opinion. Much as respondents wish to transmute our argument into one that "this Court held in favor of the 'two-way' rather than the 'three-way' reading of the Hobbs Act," Opp. 2, our position is in fact much simpler: "all" means all, and "must" means must, *whatever* the Court's reasons (procedural or substantive) for using those words in its opinion. Our position has implications for those cases – but only for those cases – in which lower courts determine that this Court did not really mean what it plainly said. We do not and need not espouse any general principle that respondents forfeit the right to raise any issues supporting the judgment below in any particular circumstances. The only general principle necessary to support our request for summary reversal is that courts instructed to act "in

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[2] Respondents suggest (at 16-17) that the issue of whether "the meaning of extortion under the Hobbs Act controlled the meaning of that same word under state law" was "fairly included" in the questions presented in *Scheidler II*. They are mistaken. The Hobbs Act question granted in *Scheidler II* (see Pet. App. 3a) was limited to what the "Hobbs Act" means and made no mention of state law or the extent to which state-law predicates under RICO are required (by virtue of *RICO*, not the Hobbs Act) to conform to minimum federal standards.

conformity with the opinion of this Court" must act in strict conformity with the opinion, not excuse lack of conformity based on analysis of things the Court did not say.

II. The Hobbs Act Issue Warrants Review

Respondents' brief is most notable for what it does *not* say about the Hobbs Act issue. It does not deny that the Seventh Circuit seriously misread *United States* v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998). It does not defend the Seventh Circuit's egregious mischaracterization of the position of the government in that case. Pet. 24-25. It does not dispute that the panel overlooked the government's *rejection* of the "free-standing" reading of the final clause of the Hobbs Act in an official Justice Department publication. Pet. 25.[3] As for the conflicts we identified, respondents do not deny that the decision below, by holding that the Hobbs Act may plausibly be read to criminalize acts or threats of violence unconnected to either robbery or extortion, parts company with the decisions of two other circuits. Pet. 18-19; 04-1352 Pet. 8, 25-26. Neither do respondents dispute that the Seventh Circuit's decision conflicts in multiple respects with this Court's decisions in *Scheidler II*, *United States* v. *Enmons*, 410 U.S. 396 (1973), and a line of cases interpreting the 1948 revisions to Title 18. Pet. 19-22. And respondents do not deny – indeed, they concede as did the Seventh Circuit – that the Hobbs Act issue presented is of national importance. Opp. 12; Pet. App. 6a. The *amicus* brief of eight States dramatically confirms that the issue is, in fact, extremely important – even more so than the Seventh

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[3] Respondents point out (at 27 n.8) that in *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999), which involved the attempted arson of an abortion clinic, the U.S. Attorney for Montana filed a brief that took a position contrary to that stated in 1997 in the Justice Department's Criminal Division Manual. Because the United States was the appellee, however, there was no need for Main Justice (through the Office of Solicitor General) to review or approve that brief before it was filed. See 28 C.F.R. § 0.20(b); U.S. ATTORNEYS' MANUAL § 9-2.170 <available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.170>. The government did not petition for rehearing.

Circuit conceded, and in ways that the court of appeals' extensive, yet substantively slapdash, analysis completely fails to account for.

Rather than offer *any defense at all* on the merits of the Hobbs Act question,[4] respondents elect to rely on a series of procedural objections. They make the Dickensian argument that the Hobbs Act issue is, after 19 years of litigation, "not yet ripe for consideration" because the Seventh Circuit indicated that it was not resolving it and because this issue has "never been decided by any court in this litigation." Opp. 3; see also *id.* at 27-28. Relatedly, respondents contend that "this case is not a proper vehicle" because the decision below lacks finality. *Id.* at 14, 24. Lastly, they argue that review should be denied because the Hobbs Act issue might be mooted by "factual determinations" made by the district court on remand. *Id.* at 3, 14, 25, 28-29. All of those arguments should be rejected.

First, respondents are wrong to say that the Hobbs Act issue is not yet ripe for consideration. As respondents concede (at 6), this issue was raised and briefed in the previous Seventh Circuit appeal. It was raised and briefed *again* in the Seventh Circuit in the Circuit Rule 54 and rehearing papers on remand from *Scheidler II*. The Seventh Circuit devoted 10 pages to discussing the arguments for and against respondents' unprecedented reading of the Hobbs Act. Thus, the court of appeals has had more than ample opportunity to address this question – and should have resolved it. Respondents also suggest that the *district court* never definitively ruled on the Hobbs Act issue. Opp. 3, 27, 28. Respondents fail to explain, however, how that submission can be reconciled with the

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[4] In response to the rehearing petitions filed in the Seventh Circuit, respondents *did* attempt to defend the "violence only" reading of the Hobbs Act. Respondents also argued, incorrectly, that this issue had been waived – an argument the Seventh Circuit implicitly rejected by devoting ten pages to discussing the Hobbs Act question. (Respondents wisely abandoned their meritless waiver argument in this Court.) The relevant portion of respondents' answer to the rehearing petitions is reprinted in an appendix to this reply brief. See App., *infra*, 1a-7a.

record.[5] Even if respondents are correct that the district court never endorsed their strained reading of the Hobbs Act, that would only confirm that the Seventh Circuit's decision to remand this case for further proceedings based on an entirely new theory is indefensible and warrants summary reversal.

Equally mistaken is respondents' contention that review should be denied because the decision below lacks finality. This Court "has unquestioned jurisdiction to review interlocutory judgments of [the] federal courts of appeals." STERN, GRESSMAN, ET AL., SUPREME COURT PRACTICE 258 (8th ed. 2002). So long as an issue was *either raised or decided* in the court of appeals, this Court has discretion to review it even though the decision below is interlocutory. *United States* v. *Williams*, 504 U.S. 36, 41, 42-43 (1992). This Court has reviewed interlocutory decisions of the federal courts of appeals that raise "some important and clear-cut issue of law that is fundamental to the further conduct of the case." STERN & GRESSMAN, at 259 (citing numerous cases). This case fits squarely within that category.

And, given the age of this litigation, this Court should not deny review of the Hobbs Act issue merely because the Seventh Circuit refused (for a second time) to resolve the issue conclusively. Cf. *NAACP* v. *Alabama*, 357 U.S. 449, 457-58 (1958) (looking beyond adequate and independent state-law ground invoked by state court to decide issue). *Amici* Consistent Life *et al.* (at 4, 5) have invoked *Bleak House* in response to the Seventh Circuit's contention that "it would be imprudent to resolve this problem of statutory interpretation at this stage" (Pet. App. 15a). Petitioners, having believed they prevailed in this litigation in its entirety through an 8-1 decision of this Court in 2003, only to be told by the Seventh Circuit two years later that it is too soon to decide whether anything they did

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[5] Petitioners clearly objected to the relevant jury instruction, and the trial court – in response to the argument of respondents' counsel that the Hobbs Act reaches freestanding acts or threats of violence – overruled this objection. See Tr. 4575-79 (reprinted at App., *infra*, 8a-10a).

violated the Hobbs Act, cannot help but think of the famous remarks of Mr. Bumble in *Oliver Twist*. See *Estate of Wilson* v. *Aiken Indus.*, 439 U.S. 877, 880 n.3 (1978) (Blackmun, J., concurring in the denial of certiorari).

Respondents are also wrong to suggest that review should be denied because the Hobbs Act issue might be mooted by other determinations made by the district court on remand. Opp. 3, 14.[6] Although it is certainly possible that the district court could resolve this case in petitioners' favor without deciding the Hobbs Act question, respondents pointedly decline in their brief to make any promise that they will refrain from taking a further appeal if that occurs. Nor do they provide any assurances that they will abandon the litigation of collateral matters that may necessitate the resolution of the Hobbs Act issue (such as their pending motion for costs, which they have not withdrawn). As the history of this litigation amply demonstrates, respondents will not accept defeat if there is any possible argument to be made to the contrary.

In any event, the possibility that this case could be resolved without a decision on remand by the district court on the Hobbs Act question provides more, not less, reason why this Court's review is needed. If the district court avoids the issue, the Seventh Circuit's indefensible opinion will remain on the books. Left uncorrected, the decision below will lend credence to an unprecedented and unjustifiable reading of the Hobbs Act and produce all manner of mischief.

Precisely for this reason, an extraordinary array of governmental, labor union, organizational, and individual protester *amici* have filed briefs urging this Court to address the Hobbs Act question *now*. Eight States have expressed serious concerns about the implications of the Seventh Circuit's "freewheeling

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[6] Respondents say that these determinations are "factual," presumably because finding facts is "a function the trial court is uniquely able to handle." Opp. 28. In fact, the remaining issues are legal in nature. See *Griffin* v. *United States*, 502 U.S. 46, 53-56, 59 (1991) (discussing effect of legal defects in general verdicts).

three-way construction" of the Hobbs Act "for state and local government officials," who are covered by the statute. See *Amicus* Br. of Alabama *et al.*, at 15 ("States' *Amicus* Br."); *id.* at 1, 4. Similarly, a large and diverse group of political activists and organizations – including two national labor unions, the IBEW and the Teamsters – have joined another *amicus* brief expressing concerns about the threat posed by the decision below, if left uncorrected, to labor and political protesters. *Amicus* Br. of Consistent Life *et al.*, at 10-15, 1a-16a ("Activists' *Amicus* Br."); see also *Amicus* Br. Concerned Women for America, at 1 (organization of 500,000 members). This Court should not ignore the pleas of these *amici* to act now. See States' *Amicus* Br. 18-20; Activists' *Amicus* Br. 4-6, 17.

III. The RICO Injunction Issue Merits Review

As explained in our petition (at 26-30), if the Court declines to reverse summarily, it should again grant review to decide whether private injunctive relief is available under 18 U.S.C. § 1964(c). See also 04-1352 Pet. 13-23.

Respondents do not deny any of what we said in the petition about this issue. Although they suggest (at 14) that proceedings in the trial court might "moot" this issue, it is also quite possible that they will not. After 19 years, and two trips to this Court, petitioners should not be required to endure ... ther proceedings in the trial court when a favorable resolution of the RICO injunction issue would end this case – especially where the Court would have resolved this question in *Scheidler II* if it had thought the case might continue. The issue is important and recurring; it has already been fully briefed in this Court; and its resolution now would provide beneficial guidance to litigants and lower courts across the country. The Seventh Circuit (in the decision below) having denied petitioners' request for en banc rehearing of this issue, it is clear that the conflict in the circuits will persist and will need to be addressed eventually by this Court. This is the right case to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Nos. 99-3076, 99-3336,
99-3891, 99-3892, and 01-2050

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Plaintiffs-Appellees,
v.
JOSEPH M. SCHEIDLER, *et al.*,
Defendants-Appellants.

On Remand from the United States Supreme Court and
on Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 7888
The Honorable David H. Coar

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II. THE SUPREME COURT ADDRESSED ONLY EXTORTION AND NOT THE PHYSICAL VIOLENCE PRONG OF § 1951

* * * * *

Further, and in contrast to the Scheidler Defendants' creative readings, the panel's February 26, 2004, Order properly declines to presume that the Supreme Court went beyond its grant of *certiorari*. *Toyota Motor Mfg.*, 534 U.S. at 202 ("'[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court.'"). *See also Glover*, 531 U.S. at 204; *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001). It would be a wild leap to conclude that, in determining the elements of extortion-based predicate acts under RICO, the Supreme Court somehow implicitly ruled that the non-extortion-based predicate acts based on the physical violence prong of 18 U.S.C. § 1951 were invalid. It is even more of a leap to conclude that the Court made such a ruling *sub silentio*. Such a ruling runs counter to the Court's previous decisions, *Stirone* v. *United States*, 361 U.S. 212, 215 (1960), to the text of § 1951, and to the parties' agreed-upon Jury Verdict Form.[9]

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[9] The Scheidler Defendants, at 6 n.1, make the contorted argument that because the Supreme Court reviewed New York law on coercion in deciding what extortion means under the Hobbs Act, it somehow inherently decided that when Congress passed the Hobbs Act, it intended that "physical violence" would also be limited by the contours of extortion under New York law. This is sheer fantasy, and nothing in *Scheidler II* or the text of the Hobbs Act remotely supports it. It is more

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IV. DEFENDANTS' READING OF § 1951 VIOLATES BASIC PRINCIPLES OF STATUTORY CONSTRUCTION

Despite their numerous waivers of the issue, Defendants nonetheless urge this Court to reach the merits and adopt their construction of the Hobbs Act — one that would limit § 1951 to two crimes, robbery and extortion. Such a reading would require the Court to overlook the statute's "physical violence" language and its own prior construction of the text, and would read statutory language to have different meanings within a single section. Moreover, such a reading ignores the broad remedial purposes Congress intended for this Act.

A. The Plain Text of § 1951 Reveals Three Separate Prongs.

The Hobbs Act criminalizes specific conduct that interferes with interstate commerce. Section 1951 makes it illegal to interfere with interstate commerce in three ways: (1) by robbery; (2) by extortion; or (3) by physical violence. In describing § 1951, the Supreme Court has adopted this plain

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likely that because Congress included extortion but not coercion in § 1951, it chose to ensure that the Act separately covered physical violence that interfered with interstate commerce, and so included this important third prong. Because the Supreme Court narrowed the scope of extortion in *Scheidler II*, acts or threats of physical violence designed to obtain control over property are no longer extortion, but can be prosecuted under the third prong: for example, a terrorist threat to blow up a bridge over the Mississippi River.

The Scheidler Defendants' further argument, at 11 n.3, that an early version of the predecessor statute to the Hobbs Act, the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, would have covered physical violence separate from extortion or robbery, reinforces our point. In drafting the Hobbs Act, Congress did *not* adopt the narrower construction, present in both the 1934 Act and an earlier draft of the Hobbs Act. Instead, it enacted broader language and a broader structure, and so covered more criminal activity.

reading: "[Section 1951] manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by *extortion, robbery or physical violence*." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).[11] Any other result would render the "physical violence" language meaningless.

Defendants urge this Court to ignore *Stirone*'s description and adopt instead the strained interpretation found in the only other case to consider § 1951's third prong, *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999) (reversing 993 F. Supp. 801 (D. Mont. 1998)). Under *Yankowski*'s reading, the phrase "acts or threats of physical violence" in § 1951(a) — the third prong of the statute — refers only to acts or threats of physical violence that accompany a robbery or an extortion.

One of the Defendants' own Supreme Court *amici*, Professor Craig M. Bradley, explains why the Defendants' and *Yankowski*'s reading of § 1951 "makes no sense." Bradley, *NOW* v. *Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Review 129, 142-(1994).[12] As Professor Bradley

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[11] Unless otherwise noted, emphasis in quoted material has been supplied.

[12] Although the Scheidler Defendants now attempt to discredit their former *amicus*, they are unable to counter Professor Bradley's facts or reasoning and cannot provide a sensible, non-redundant construction of § 1951(a). Contrary to the Scheidler's assertions, Bradley correctly states that the Hobbs Act was *"first proposed during* World War II," and expressly notes that the war had ended before the Act's passage, *see* fn.78. There is no reason to think Congress ignored the need to protect commerce from acts or threats of physical violence.

Tellingly, the Defendants' selective citation to Bradley's footnote 77 fails to advise this Court of Bradley's conclusion: it is preposterous to argue that the third prong of § 1951 was included by Congress only to cover a "farfetched and unlikely" scenario that is probably already encompassed within the "attempts" or "conspires" language of the Hobbs Act. As Professor Bradley writes, "Surely Congress did not add a special clause to the Hobbs Act to deal with such a remote possibility." If

shows, § 1951 defines the crime of extortion *to include violence:* "the obtaining of property from another ... induced by the wrongful use of actual or threatened force, *violence* or fear." 18 U.S.C. § 1951(b)(2). Likewise, the crime of robbery is also defined to include violence: "the unlawful taking or obtaining of personal property from the person against his will, by means of actual or threatened force or *violence,* or fear of injury to his person or property." 18 U.S.C. § 1951(b)(3). Attempts and conspiracies are also covered, § 1951(a). Thus, the separate offenses of extortion and robbery already encompass acts or threats of physical violence. If the third prong of § 1951 applied to nothing more than violence *in the context of* extortion or robbery, the statutory language involving "physical violence" in § 1951(a) would be entirely redundant.[13]

By contrast, Plaintiffs' interpretation takes account of Congress' use of the word "or" to set off each separate violation: subsection 1951(a) criminalizes interference with interstate commerce by robbery or extortion *or* physical violence. Only this reading gives effect to all the words of the statute, as required by principles of statutory construction. *See Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

The Defendants' forced reshaping of § 1951's text to fit their desired meaning, *see OR* fn.1, Scheidler at 7, amounts to a redraft of the statute. To achieve their desired ends, the Defendants torture the text beyond all recognition and argue that the textual phrase, "this section," has meanings that are internally inconsistent, a clear violation of an elementary rule of statutory construction. *Mohasco Corp.* v. *Silver,* 447 U.S. 807

Congress had intended the meaning Defendants proffer, the third prong would never have been included.

[13] OR's "subordinate enforcer" argument, *see* footnote 2, ignores the fact that the robbery and extortion prongs of § 1951 themselves criminalize attempts and conspiracies, as Professor Bradley also explains, *id.* at 142-43. OR's strained suggestion that the third prong brings in some "enablers" who are not already covered suffers from the same fatal flaw as the rest of Defendants' argument.

(1980) (courts must not construe the same word to have two different meanings in a single statute). Defendants ask the Court to read the words "this section," as used in § 1951(a), to mean only subsection (a). Yet, they must admit that the same words, "this section," when used in §§ 1951(b) and (c), unquestionably refer to § 1951 as a whole, not just subsection (a), (b) or (c). A reading based on the premise that Congress used the same language to have two inconsistent meanings within a single section of the statute is plainly erroneous. *Mohasco,* 447 U.S. at 825-26.[14]

Defendants' attempt to read the third prong of § 1951 out of the statute violates cardinal principles of statutory construction: that statutes should be read to give meaning to every word in the text, and that a phrase cannot have two different meanings in a single statutory section. Their construction is simply incorrect.

B. Congress Intended That § 1951 Be Broadly Construed.

Not only is Plaintiffs' construction of the third prong of § 1951 the only one that conforms to basic principles of statutory construction, but it is the only one that comports with the broad remedial purpose of the statute. As the Supreme Court made clear in *Stirone,* the broad language of § 1951 shows Congress intended it to invoke all the power Congress had:

> The Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws interference with commerce "in any way or degree."

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[14] Defendants' asserted fear that the Plaintiffs' reading of § 1951 would mean the statute covered "any interference with commerce" where physical violence was involved is greatly exaggerated. Defendants ignore a key limitation, made clear in subsection (c): the Hobbs Act, by its terms, covers only *interstate* commerce. *See* § 1951(b)(3) (defining "commerce," "as used in this section," as interstate commerce). *See also* Section V below. Defendants' parade of horribles is sheerly imaginary.

361 U.S. at 215. *See also United States* v. *Elders*, 569 F.2d 1020, 1023 (7th Cir. 1978) ("Courts have consistently held that the Act should be given an expansive interpretation. . . .").

There can be no dispute that Congress enacted § 1951 to address a serious problem of violence and threats of violence that harmed the flow of interstate commerce. Consistent with congressional intent and the Supreme Court's interpretation of it, the statute must be broadly construed to give meaning to Congress's decision to criminalize the separate violation of physical violence that interferes with interstate commerce.

Finally, even if Defendants had not waived their arguments so that their textual interpretation could be considered, the trial court should have the first opportunity to consider these issues in light of the evidence it saw and heard at trial. If the district court were to decide that the physical violence acts were not sufficient, standing alone, to support the nationwide injunction, the proper interpretation of § 1951 would be immaterial. February 26, 2004, Order at 3-4.

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Respectfully submitted,

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.

Dated: April 1, 2004.

* * * * *

4543 Header, Line 1

[line numbering omitted]

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)	
Plaintiff	)	No. 86 C 7888
vs.	)	April 13, 1998
	)	8:15 a.m.
	)	Chicago, Illinois
	)	Trial
JOSEPH M. SCHEIDLER, et al.,	)	
Defendants.	)	

VOLUME 24
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID H. COAR

* * * *

[Tr. 4575]

THE COURT: Now, on 4 we also addressed all of this last week, and I thought that like everything else nothing ever comes

to rest in this case, 4 was going to be given as we left it last week. I don't understand what these proposed changes are, Mr. Crain.

MR. CRAIN: Your Honor, quite simply it's just that if you look at 4, E is included in A. I mean, you're giving the opportunity for the chance for the jury to give the plaintiffs two bites at the apple over the same act. There [Tr. 4576] could be an act of threat or physical violence that would still be an act of extortion. It's included in A. That's the first problem. And then I guess the other problem having to do with the Travel Act in F doesn't put the language of the Act at all. It leaves out a critical word in the statute.

* * * *

[Tr. 4577]

THE COURT: All right. What about Mr. Crain's point on E in 4?

MS. CLAYTON: Oh, he's wrong, Your Honor. There two different elements, two different parts of the Hobbs Act. A person could actually violate both by doing the same act, but they're a little bit different. E is almost verbatim out of the second – I think it's the second part. Threats or acts of extortion, of course, could include physical violence. But violence to property is something quite different, and that's a separate violation under the Hobbs Act. I thought we had agreed on that a long time ago. I'm sort of puzzled that he's raising that now. I could show Your Honor the cite if you want, but it's right there I think [Tr. 4578] in 1951 or whatever it is.

MR. CRAIN: All we're saying is that E is a subset of A, Your Honor. It's still the same violation as extortion. However you want to say it, it's still coming out of same statute.

MS. CLAYTON: It's coming out of the same statute but a different section, just as Sections C and D of RICO are two different sections. You might violate them by doing the very same act. Let me see if I can find it here.

MR. CRAIN: Your Honor, one can be guilty of conspiracy, but this is – this doesn't say that.

MS. CLAYTON: Section A of the Hobbs Act says whoever in any way obstructs or affects commerce, et cetera, by extortion, and then the second part says or attempts or conspires to do so. And then the third part is or commits or threatens physical violence to any person or property. Those are three separate violations under Section 1951-A.

MR. CRAIN: It's still extortion, Your Honor.

MS. CLAYTON: I don't believe it could be.

MR. CRAIN: A, B, or C it's still extortion.

MS. CLAYTON: I don't believe that could be right. Otherwise I can't imagine why Congress would have put extortion in the first one, attempt or conspire to do so in the next one, and have a whole different set of phraseology in the third one.

[Tr. 4579]

THE COURT: I'm going to leave it as is. Now, with respect to – the only changes, therefore, in 4, F adds with intent before to commit. G, the reference – the parenthetical reference is to H, and similarly in H the parenthetical reference is to F. Anything else?

* * * * *